No. 13671

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WATERFRONT EMPLOYERS OF WASHINGTON; LOCAL 19, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; AND INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended[1] for enforcement of its order of February 26, 1952, and its Supplemental Order of November 4, 1952, issued against respondents Waterfront Employers of Washington, herein called WEW; International Longshoremen's and Warehousemen's Union, herein called ILWU; and Local 19 of ILWU, herein

[1] 61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151 *et seq.* Relevant portions of the Act appear in Appendix B, *infra*, pp. 49–52.

called Local 19. This Court has jurisdiction of the proceedings under Section 10 (e) of the Act, the unfair labor practices having occurred within this judicial circuit at Seattle, Washington. The Board's Decision and Order (R. 130–170) [2] are reported at 98 N. L. R. B. 284 and its Supplemental Decision and Order at 101 N. L. R. B. No. 53.[3]

STATEMENT OF FACTS

This case is concerned with the operation of the Seattle, Washington, hiring hall pursuant to contractual arrangements between the respondent unions on the one hand and the respondent Waterfront Employers of Washington on the other. These contractual arrangements are embodied in two agreements; one, herein called the Coast Agreement, executed on December 17, 1948, between the Waterfront Employers of the Pacific Coast, on behalf of and authorized and ratified by respondent WEW on the one hand, and respondent ILWU on the other; and the second, subsidiary to the Coast Agreement, herein called the Dock Agreement, executed on February 26, 1949, between the WEW and Local 19 of the ILWU. Each of these agreements contains a union-security provision not sanctioned by the Act which requires the preferential dispatching of members of the Union from the hiring hall for work on the waterfront

[2] References to the printed record are designated "R." References preceding a semicolon, where one occurs, are to the Board's findings; those following, to the supporting evidence.

[3] The Supplemental Decision and Order, inadvertently omitted from the printed record is reproduced in Appendix A to this brief, pp. 45–48.

before the dispatch of nonunion men. In the course of the operation of the Seattle hiring hall in accordance with this provision in the Coast Agreement, two longshoremen, Albert Crum and Clarence Purnell, were refused dispatch because they had failed to pay a union fine levied against them by Local 19 and were therefore not in good standing.

The Board found that the execution and enforcement of the preferential provision of the Coast Agreement was attributable to respondent WEW and that by its execution and enforcement WEW encouraged membership in and furnished support to the ILWU in violation of Section 8 (a) (1), (2), and (3) of the Act; and that the execution and enforcement of the preferential provision of the Dock Agreement constituted a violation of Section 8 (a) (1), (2), and (3) by respondent WEW and of Section 8 (b) (1) (A) and (2) by the ILWU and its Local 19. The Board found further that the discriminatory refusal to dispatch Crum and Purnell constituted a violation of Section 8 (a) (3) and (1) by the WEW and a violation of Section 8 (b) (1) (A) and (2) by the ILWU and its Local 19. In so finding, the Board rejected contentions of all three respondents that the charges with respect to the execution of the agreements were untimely filed, contrary to the prohibition of Section 10 (b) of the Act; contentions of the WEW and the ILWU that they had no part in the operation of the Seattle hiring hall and could not properly be held responsible for discriminatory acts occurring there; contentions of Local 19 that it was not a party to the Coast Agreement, and had not authorized the dis-

crimination against Crum and Purnell and that consequently it could not properly be held responsible therefor. The facts upon which the Board's findings are based may be summarized as follows:

A. The business of WEW

Waterfront Employers of Washington is a nonprofit membership corporation organized under the laws of the State of Washington, having its principal office in Seattle, Washington.[4] Its members either operate oceangoing vessels engaged in the transportation of passengers and freight or perform stevedoring services for companies operating such vessels, and include firms directly or indirectly engaged as employers of labor in the commercial transportation or hauling of goods by or over water, rail, or truck, on docks or in warehouses[5] (R. 59; 28–29, 42, 187).

One of the purposes for which WEW exists is to represent its employer members in collective bargaining relations with labor organizations representing longshoremen and other shore employees. It negotiates collective bargaining agreements for its members, on occasion allocates the employees among its various member companies, acts as paymaster, and lists itself as the employer of longshoremen on Federal withhold-

[4] WEW is one of several similar groups of waterfront employer associations on the west coast (see n. 6, *infra*). At the time of the execution of the agreements here in issue, all of these groups were for coastwide purposes joined together in Waterfront Employers of the Pacific Coast. At the time of the hearing, the Waterfront Employers of the Pacific Coast had been succeeded by the Pacific Maritime Association, herein called PMA.

[5] It is undisputed that the members of WEW are engaged in interstate commerce (R. 59–60; 28–29, 42, 184–185).

ing tax statements (R. 59–60, 132; 187–188, 191, 197, 330–331, 335).

On the basis of the foregoing facts, the Board found that WEW was an employer within the meaning of Section 2 (2) of the Act, and was engaged in interstate commerce within the meaning of Section 2 (6) (R. 60, 62).

B. The execution of the Coast and Dock Agreements

1. The Coast Agreement

The Coast Agreement, the first of the two agreements with which this case is concerned, was negotiated between the Waterfront Employers Association of the Pacific Coast in behalf of the WEW and other named employer associations, and the ILWU (R. 229).[6] Substantial oral agreement as to the terms here pertinent was reached by the negotiating parties in November 1948, during the course of a strike by the ILWU in all the ports of the United States Pacific coast; the terms agreed upon were put into effect at the end of the strike on December 6, 1948, and finally

[6] The preamble of the agreement provides (R. 229):

"This agreement, dated December 6, 1948, by and between the Waterfront Employers Association of the Pacific Coast, Waterfront Employers Association of California, Waterfront Employers of Oregon and Columbia River, *Waterfront Employers of Washington*, hereinafter designated as the Employers on behalf of their respective members, and the International Longshoremen's and Warehousemen's Union, hereinafter designated as the Union." [Emphasis added.]

The WEW did not participate in the actual negotiation of the agreement. It authorized its negotiation, however, and ratified it (R. 63; 220–222). Its position as a party to the agreement is clear and is not in issue.

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embodied in written form and initialed on December 17, 1948 (R. 63; 229).[7]

The agreement provided for the employment of longshoremen through hiring halls to be established in four Pacific coast ports, including the Port of Seattle. Section 7 (a) of the agreement provided for the overall operation of the hiring hall in each of these ports by a Port Labor Relations Committee to be established in that port and to be composed of an equal number of representatives of the Employers and of the ILWU (R. 64; 246, 260). The agreement provided further that the ~~selection of the~~ chief dispatcher, in charge of the day-to-day operation of the hiring hall, should be selected by the Union by vote, but that he must qualify under standards set by the Port Labor Relations Committee and must work under rules and regulations promulgated by the Committee (R. 64; 247). The agreement also provided that the Employers and the ILWU were to share equally in the expense of maintaining and operating the hiring hall (R. 64; 246).

Section 7 (d) of the Coast Agreement provided as follows (R. 64; 248):

> (d) Preference
>
> Preference of employment shall be given to members of the International Longshoremen's and Warehousemen's Union whenever available. Preference applies both in making additions to

[7] The prefatory note to the agreement states that the final signing of the agreement will be postponed until the negotiation of the whole agreement of which it is but a part is completed (R. 63; 229).

the registration list and in dispatching men to jobs. This section shall not deprive the Employers' members of the Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list and shall not interfere with the making of appropriate dispatching rules.

2. The Dock Agreement

The Coast Agreement was supplemented on February 26, 1949, by the "Dock Workers' Agreement for the Port of Seattle," herein called the Dock Agreement, which was executed by the WEW and Local 19 and which covered dock workers on the Seattle waterfront [8] (R. 65; 268). This agreement, like the Coast Agreement, provided that the hiring of all dock workers should be through "the central hiring hall maintained and operated jointly by the International Union and the Coast Association (i. e., the Waterfront Employers Association of the Pacific Coast) and that "the Port Labor Relations Committee" should have control over the registration of dock workers and should determine the manner in which they should be dispatched (R. 65; 284–285). The agreement contained in Section 8 (c) a preferential hiring provision, similar to the corresponding provision of the Coast Agreement, which read (R. 65; 285):

[8] In general, longshore work consists of the movement of cargo between ship and dock whereas dock work consists of the movement of cargo to the dock preparatory to loading it on a ship or the movement from the dock to railroad cars and trucks for delivery to the consignee (R. 65, n. 4; 269).

(c) Preference

> Preference of employment shall be given to members of the Union whenever available. Preference applies both in making additions to the registration list and in the dispatching of men to jobs. This Section shall not deprive the Employers' members of the Port Labor Relations Committee of the right to object to unsatisfactory men (giving reasons therefor) in making additions to the registration list, and shall not interfere with the making of appropriate dispatching rules.[9]

The parties to the contract had not at any time pertinent to this case, complied with the conditions required by the Act for the execution of a valid union-security provision.[10] Local 19 had not been selected as the representative of a majority of the employees

[9] In this agreement "the Union" referred to Local 19 (R. 268).

[10] Section 8 (a) (3) of the Act in the proviso which was in force at the time of the execution of the Coast agreement provides for the execution of a union-security provision in an agreement under the following specific conditions:

"*Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: * * *."

The proviso has since been amended to delete clause (ii) above.

of WEW's member companies, nor had it been authorized to negotiate a union-security agreement in their behalf. Moreover, the absolute preference in employment opportunity given to union members transcends the permissible limits of a union-security agreement even if the other preconditions had been satisfied (R. 78). See n. 10, *supra*.

C. The enforcement of the preferential hiring provisions of the agreements

1. The administration of the hiring hall at the time of the events hereinafter described

At the time of the events in this case, the Waterfront Employers of the Pacific coast had been succeeded by the Pacific Maritime Association, herein called PMA (R. 63; 325–327). PMA was serving as the representative of the Employers on the Port Labor Relations Committee of the Port of Seattle and ILWU had delegated its representation on that committee to Local 19, its Seattle local (R. 66; 224–225, 326). The day-to-day operation of the hiring hall was being conducted by Chief Dispatcher Laing, who was selected by Local 19 (R. 65, 147; 225). The Employers' share of the expenses of the hall was being met from monies collected by PMA from its member companies and other stevedoring companies on the waterfront. Part of these funds were deposited to the account of WEW, which in turn deposited the Employers' share to the account of the Port Labor Relations Committee which paid the bills. WEW was serving as the paymaster of the longshoremen and dock workers employed by its member companies, all

of whom by the requirements of the agreement were hired through the hiring hall (R. 64–65, 66 n. 5; 188, 246, 284, 330–331, 346). Daryl Cornell, the president of WEW was serving as the representative of PMA on the Port Labor Relations Committee and was the secretary of the Committee (R. 66; 186–187, 347–349, 350–352, 475–476). WEW was not directly represented on the Committee by any of its members (R. 325, 329, 349).

2. The refusal to dispatch Albert G. Crum

Albert G. Crum was first employed on the Seattle waterfront in 1936. He became a registered longshoreman and a member of Local 19 in 1939 (R. 84; 360).

Prior to the 1948 strike on the waterfront and thereafter until his layoff, Crum had served as a regular member of a longshore gang and had been dispatched from the hiring hall regularly with the gang (R. 89–90, 155; 364–365). Some time in December 1948, after the termination of the strike on December 6, Crum was called before the executive board of Local 19 on a charge that he had failed to stand his share of picket duty during the strike. The executive committee found him guilty of the charge and fined him approximately $2,400. The president of Local 19 informed him that his name would be taken off the work list "from this day on until the fine is paid" (R. 86; 367–370).

The next day Crum went to the office of the secretary of Local 19 and asked him if he was not permitted by the terms of the Union's constitution to continue to work for 30 days despite the imposition of the fine.

Gettings, the representative of the ILWU, who happened to be in the office, informed him that he did have the right to continue to work for 30 days,[11] and advised him to return to his gang (R. 86–87; 371–372). Gettings then instructed the secretary of the Union not to "bug" the men who had been fined, for 30 days (R. 87; 372).[12]

[11] The constitution and bylaws of Local 19 provided in Article XI, Section 8, that "any member failing to pay a fine levied against him within 30 days shall stand suspended" (R. 458–459). Article IX, Sections 2, 3, and 4, of the constitution and bylaws (R. 455) sets forth the steps by which loss of status could occur. Section 2 provides that assessments must be paid before dues; Section 3, that any member not paid up for the current quarter's dues shall cease to be in good standing; and Section 4, that any member not paid up to date shall be debarred from all benefits.

[12] The names of all longshoremen who have been registered by the Port Labor Relations Committee are posted on a board at the hiring hall, and the names of "casuals" who have not been registered are posted on a second board (R. 416, 523). Beside each name is a hole into which may be fitted a small "plug" furnished each longshoremen. Every longshoreman who is not a member of a gang is required to indicate his availability for work each day by "plugging in" (R. 87; 360–363). Members of gangs are not required to plug in but have the privilege of telephoning the dispatcher to learn if their gangs are to be dispatched (R. 87; 366). It was the practice to place a "bug," a colored tack, behind the name of a union member who was delinquent in the payment of dues or who had an unpaid fine outstanding, and to refuse to dispatch him. A "bug," therefore, served as a notification to the delinquent member that he would not be dispatched in normal turn until he was again in good standing in the union (R. 87; 372–373, 381, 443). In dispatching men, it was the practice to dispatch first the registered longshoremen in good standing in the union; then registered longshoremen not members of the union; and finally, the "casuals" (R. 85–86; 416–417, 514–515, 248). WEW was aware of this practice (R. 526–527).

Before the expiration of the 30-day period, Crum's gang was laid off. Thereafter, as was customary with members of gangs, Crum telephoned the hall daily to find out if his gang was to be dispatched. For several days he was told that the gang was not to be dispatched that day. After his 30-day period of grace had expired, he was told by the dispatcher that there was a "bug" behind his name on the board, and that he would not be dispatched with his gang until he had paid the fine assessed against him (R. 87; 374–375). Thereafter, Crum did not call the hiring hall or plug in on the board to indicate his availability for work (R. 87; 391–392).[13] However, during the next three months, Crum did, upon three occasions, ask supervisory employees of stevedore companies (members of WEW) for which he had worked if there was anything against his name. He was assured that there was nothing against his name in the WEW files, and that he would be hired if he was sent to them by the hiring hall (R. 88–89; 376–377, 380–381).

On April 20, 1949, at a meeting of the Port Labor Relations Committee Crum's name was removed from the registration list upon a motion of the representatives of Local 19, upon the asserted ground that his earnings over a period of four years indicated that he was only a "casual" worker on the waterfront (R. 89; 482, 484). This action, apart from the "bug" against his name on the board at the hiring hall, permanently precluded his dispatch as a registered

[13] See note *supra*.

longshoreman under the rotation system. Daryl Cornell, the secretary of the Port Labor Relations Committee, testified that the "deregistration" was effectuated in accordance with an established practice of the Port Labor Relations Committee which checked the earnings of individual longshoremen upon request and deregistered those whose earnings were so low as to indicate that they should be classed as casual workers on the waterfront (R. 89; 515–516). Cornell admitted, however, that the checking of names was not systematically or regularly made, but on a hit and miss basis, whenever a member of the Committee felt moved to review the employment records of the longshoremen on the list (R. 532–533). Even if the survey showed a longshoreman to be only a part-time worker, the Committee did not invariably remove his name, but used its discretion. Crum's name had been reviewed before during the 4-year period and the Committee had refused to act because it had believed that he had not worked full time because of an injury (R. 153; 587). During a substantial part of the 4-year period Crum had been doing work for a gear locker company (R. 89; 364). Normally, Chief Dispatcher Laing did not report a man for low earnings as a longshoreman if he had been doing gear locker work. However, in Crum's case, Laing, despite his knowledge of the actual situation, reported Crum to the Committee for low earnings and Crum was deregistered (R. 530–532, 586–587, 591–592).

3. The refusal to dispatch Clarence Purnell

Clarence Purnell, a member of Local 19 and a registered longshoreman, worked intermittently as an

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individual longshoreman, not a member of a gang, from 1942 until the waterfront strike began in September 1948 (R. 91; 413). After the end of the strike in December 1948, he, like Crum, was called before the executive board of Local 19 on a charge of not doing his share of the picketing, was found guilty and fined. He was told that he could work for 30 days but no longer unless the fine was paid (R. 91; 417–420). Purnell was suffering from arthritis during the 30-day period of grace and was physically unable to work. Thereafter he made no attempt to "plug in" on the board at the union hall, because, according to his testimony at the hearing, he didn't have the money to pay his fine; he had been around long enough to know that one "had to pay fines before you could pay dues" and he could not work; and that it was useless to go down there (R. 92; 420). Like Crum, he inquired at several companies for which he had worked as to whether there was anything against his name in the company files and was informed that there was not (R. 92; 425).

Shortly after imposition of the fine by Local 19, Purnell called the dispatching office and asked Chief Dispatcher Laing for a "statement of availability" so that he could apply for unemployment compensation under the State compensation laws. Laing refused on the ground that Purnell "still had 30 days in which he could work" and in effect offered him a job (R. 91; 422–423).[14] When the 30-day period was almost up, Purnell again telephoned Laing and re-

[14] As already noted, however, Purnell's arthritic condition required rejection of this offer.

quested a statement. The request was again denied, this time on the ground that Laing thought that Purnell's "time was up," and that Purnell would not be permitted to work until he had paid his fine. Laing referred Purnell to Bill Clark, secretary of Local 19, who told Purnell that he would not be given an availability statement and that he could not work until his fine was paid (R. 426, 429–430).

Dispatcher Laing testified at the hearing that Purnell's name was "still on the board" and that the latter would have been eligible for dispatch if he had "plugged in" (R. 92; 569, 509). On the other hand, Laing neither denied nor explained his contradictory statement to Purnell (R. 426) that Purnell's "time was up" and that he could not work.

THE BOARD'S CONCLUSIONS

Upon the foregoing facts the Board found (R. 135–136) that the execution and enforcement of the Coast Agreement containing an illegal provision for the preferential hiring of Union members, and the execution and enforcement of the subsidiary Dock Agreement embodying a similar illegal preferential hiring provision constituted violations of Section 8 (a) (1), (2),[15] and (3) of the Act by respondent WEW; and that the execution and enforcement of the Dock

[15] In finding a violation of Section 8 (a) (2), the Board disagreed with the Trial Examiner who recommended dismissal in that respect on the ground that the actions of WEW did not furnish "support" to the union within the meaning of Section 8 (a) (2). See *infra*, pp. 31–32. Insofar as the Board differed here and elsewhere with the Trial Examiner on issues of law, the Trial Examiner's conclusion is, of course, entitled to no special weight. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 496.

Agreement constituted also a violation of Section 8 (b) (2) and 8 (b) (1) (A) by respondent Local 19.[16]

The Board, like the Trial Examiner, rejected WEW's contention that the charge of unfair labor practice with respect to the *execution* of the Coast Agreement was untimely filed (R. 134–135). WEW urged that that agreement was executed on or about November 25, 1948, when an oral understanding was reached as to certain of the contract terms and that the filing of a charge by Crum on June 14, 1949, alleging execution of an unlawful agreement was precluded in view of the six-month Section 10 (b) limitation on the filing of charges. The Board noted, however, that whether or not a cause of action arose out of the oral understanding of November 1948, a cause of action clearly arose on December 17, 1948, a date within six months of the filing of the charge when, for the first time, a written agreement embodying the illegal hiring provisions was prepared and initialed.

In respect to Employees Crum and Purnell, the Board found (R. 139–146) that they had been discriminatorily refused dispatch pursuant to the prefer-

[16] The complaint in the instant case made no allegation and hence the Board made no finding in respect to the responsibility of the ILWU for the execution of the Coast Agreement. Counsel for the General Counsel stated at the hearing that such an allegation was omitted from the complaint because the Board, in its prior decision in *International Longshoremen's and Warehousemen's Union*, 90 N. L. R. B. 1021, had already determined that the execution by the ILWU of the preferential hiring clause of the Coast Agreement, in issue here, constituted a violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act and had issued an order in respect thereto. The General Counsel did not think it necessary to relitigate the issue in the instant case (R. 133, n. 4).

ential hiring provision of the Coast Agreement. In finding that Purnell had been discriminatorily denied dispatch, the Board disagreed with the Trial Examiner who, although he expressed "large doubts" as to the truth and accuracy of Dispatcher Laing's statement that Purnell would have been dispatched if he had applied, believed that he must credit the statement in the absence of a specific application for employment by Purnell. The Board discredited Laing's statement in view of the conclusive and undisputed evidence offered of the practice of Local 19 to deny dispatch to union members with outstanding fines and unpaid dues, and in view of undenied statements by Laing and Clark to Purnell that his "time was up" and that he could not work until he had paid his fine (R. 143–146). The Board held that under these circumstances, it would have been useless for Purnell to have "plugged in" on the board (R. 146).

The Board held that the unlawful discrimination against Crum and Purnell was attributable to respondent WEW and constituted a violation of Section 8 (a) (3) and (1) of the Act on the ground that WEW was a party to the agreement which established the unlawful practice under which such a discriminatory refusal to dispatch was normally to be anticipated, and that this practice was in fact known and acquiesced in by respondent WEW (R. 148–149). The Board held that the unlawful discrimination was attributable also to the respondent unions and constituted violations of Section 8 (b) (2) and 8 (b) (1) (A) of the Act: on the part of

the ILWU on the grounds that the ILWU was a signatory to the Coast Agreement pursuant to which the discrimination took place, that it had knowledge of the discriminatory practice arising under the contract, and that its delegation of power to administer the agreement to its Local 19 did not relieve it of responsibility for the enforcement of the illegal provisions here in issue; and on the part of Local 19 on the grounds that Local 19 was in immediate charge of the administration of the agreement and its illegal provision pursuant to which the discrimination occurred, and that Local 19 selected the dispatcher who carried out the discrimination (R. 147–148).[17]

[17] In holding the ILWU responsible for the enforcement of the Coast Agreement, the Board disagreed with the Trial Examiner who recommended the dismissal of the complaint as to the ILWU on the ground that it had not participated actively in the enforcement of the Coast Agreement and had delegated its responsibility in this matter to Local 19, a separate entity. In holding Local 19 to be responsible for the execution of the Dock Agreement and for the discrimination against Crum, the Board disagreed with the conclusion of the Trial Examiner that the issuance of a complaint and findings in respect to these two issues were precluded by the six-month limitation on the filing of charges contained in Section 10 (b) of the Act because specific charges in respect to them had not been filed within six months of their occurrence. The Board held that the original charge by Crum, timely filed, alleging the execution and enforcement of the illegal preferential hiring provision of the Coast Agreement could properly be amended to include the execution of the same illegal provision in the subsidiary Dock Agreement by the ILWU's Seattle Local 19; and that the discrimination against Crum could properly be included by amendment to the charge alleging an identical discrimination against Purnell. These issues will be discussed in detail below, pp. 32–41.

THE BOARD'S ORDER

A. Respondent WEW

The Board's order requires respondent WEW to cease and desist from discriminating in the hire and tenure of employees by (a) maintaining in effect, or participating in any manner in the enforcement of the union-security provisions of the Coast and Dock Agreements, or (b) entering into, renewing, or participating in the enforcement of any like or related agreements containing union-security provisions not in conformity with the proviso of Section 8 (a) (3) of the Act; and to cease and desist from in any other manner interfering with, restraining, or coercing employees of its employer members in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement made in accordance with the proviso of Section 8 (a) (3) of the Act (R. 157–158).

Affirmatively, the Board ordered respondent WEW (1) to make whole, jointly and severally with respondent unions, Crum and Purnell for any loss of pay suffered by them by reason of the discrimination against them; (2) to notify the Port Labor Relations Committee and the dispatchers of the Seattle, Washington, hiring hall in writing, with copies to Crum and Purnell, that the hiring hall dispatchers (a) are not to give effect to the preferential hiring provisions of the Coast and Dock Agreements; (b) are not to discriminate in any other manner in the hire and tenure of employment through the hiring hall because of their failure to acquire or retain membership status

in the respondent unions; and (c) are to make promptly available to Crum and Purnell all dispatch privileges of the hiring hall upon request, on the nondiscriminatory basis existing with respect to union members at the time of the discrimination against them, and, in Crum's case, without regard to the "deregistration" action of April 20, 1949;[18] (3) to notify, in writing, each of the employer members of respondent WEW of the terms of the Board's order, and request that each of them take all necessary steps (including the transmittal of copies of the written notice required to be sent to the Port Labor Relations Committee and to the dispatchers) to insure that the dispatchers will not discriminate against any applicants for employment because of their failure to acquire or retain membership status in the ILWU or Local 19; (4) to invoke such powers and rights as it may have as to each member of WEW who employs workers covered by the Coast and Dock Agreements or who utilizes the facilities of the Seattle, Washington, hiring hall in order to discharge its financial obligations incurred under the Board's order, and to secure the employers' cooperation in carrying out the terms of the order, and (5) to post appropriate notices in its business offices and in the Seattle, Washington, hiring hall (R. 158–161).

[18] The Board, in disagreement with the Trial Examiner, found on the basis of the facts set forth at pp. 12–13, *supra*, that the action of "deregistering" Crum had not been taken in good faith and that it should be disregarded in considering his reinstatement and back pay (R. 155–156).

B. Respondent unions

The Board ordered *Local 19* and the *ILWU* to cease and desist from (1) giving effect to the union-security provisions of the Coast and Dock Agreements to which they are a party, and/or participating in the enforcement of such union-security arrangements whether or not they are a party; (2) entering into, renewing, agreeing to, or participating in the enforcement of, any like or related union-security agreement or arrangement which has the effect of imposing upon employees or prospective employees of employers who utilize the Seattle, Washington, hiring hall, the requirement of union membership as a condition of employment unless said agreement or arrangement conforms to the requirements of Section 8 (a) (3) of the Act; and (3) in any other manner (a) requiring or inducing the dispatchers of the Seattle, Washington, hiring hall to discriminate against Crum or Purnell or other employees because of a failure to maintain their union membership in good standing unless a union-security agreement be made in accordance with Section 8 (a) (3) of the Act; (b) causing or attempting to cause employers using the Seattle hiring hall to discriminate against employees or prospective employees in violation of Section 8 (a) (3) of the Act; (c) restraining or coercing employees or prospective employees in the rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by an agreement made in accordance with the requirements of Section 8 (a) (3) of the Act (R. 161–162).

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Affirmatively, the Board ordered respondent unions (1) jointly and severally with respondent WEW to make whole Crum and Purnell for any loss of pay suffered by reason of the discrimination against them; (2) to notify in writing the WEW, the Port Labor Relations Committee, the dispatchers at the hiring hall, and the employers who utilize the hiring hall, with copies to Crum and Purnell that they (a) will not give effect to the union-security provisions of the Agreements; (b) will not discriminate in any other manner against an applicant for employment because he is not a union member in good standing; and (c) will promptly make the privileges of the hiring hall available to Crum and Purnell; and (3) to notify and direct their representatives or agents who are members of the Port Labor Relations Committee to take any necessary action to restore the name of Crum to the Port Registration lists; and (4) to post appropriate notices in their offices and in the Seattle hiring hall (R. 162–164).

SUMMARY OF ARGUMENT

1. Respondent WEW, by authorizing and ratifying the Coast Agreement and by executing the Dock Agreement, both of which included illegal preferential hiring provisions not protected by the proviso to Section 8 (a) (3) of the Act, and by enforcing these unlawful provisions, violated Section 8 (a) (3) and (1) of the Act. By these actions, respondent WEW also supported the signatory unions in violation of Section 8 (a) (2) of the Act. Respondent Local 19,

by executing and enforcing the Dock agreement, violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

2. The discriminatory refusal of the Chief Dispatcher at the Seattle hiring hall to dispatch longshoremen Albert Crum and Clarence Purnell because they had not paid a Union fine levied against them and consequently were in "suspended" status in the Union, was effected pursuant to the illegal preferential hiring provision of the Coast Agreement requiring the preferential hiring of union members in good standing, and is attributable to respondent WEW, an employer within the meaning of the Act, to respondent ILWU, and to respondent Local 19. The discrimination is attributable to respondent WEW because such a discriminatory refusal to dispatch union members not in good standing was a naturally foreseeable consequence of the preferential hiring provision of the Coast Agreement, to which it was a party. It is established that an individual is responsible for the foreseeable consequences of his actions. Furthermore, respondent WEW was aware of, and acquiesced in, the practice of the dispatchers to refuse to dispatch longshoremen, on the basis of their good standing in the union pursuant to the preferential hiring provision of the Coast Agreement. The discrimination is attributable to the ILWU because of its execution of the Coast Agreement, and its demonstrated knowledge of the hiring hall practices pursuant to which the discrimination occurred. The ILWU may not escape responsibility for its actions by delegating the enforcement of the contract provisions to its Local 19. The discrimination is attributable to Local 19 because Local 19 was

in immediate control of the operation of the hiring hall, and selected the dispatcher who, as the agent of Local 19, carried out the discrimination.

3. The issuance of the complaint with respect to the execution of the Coast and Dock Agreements and with respect to the discriminatory enforcement of the Coast Agreement in the refusal to dispatch Crum is not barred by Section 10 (b) of the Act. The charge alleging the execution of the Coast Agreement to constitute an unfair labor practice was filed within six months of the time the agreement was put in writing and initialled by the parties. The execution of the Dock Agreement in February 1949 by Local 19, extending the benefits of the Coast Agreement to dockworkers and containing the same illegal preferential hiring provision, was merely an extension of the unfair labor practice alleged in the original charge, and was properly introduced into the case by an amendment to the original charge. Moreover, the continued enforcement of the illegal preferential hiring provisions established by the Coast Agreement and implemented by the Dock Agreement constituted a *continuing* unfair labor practice which amply supports the Board's remedial order and to which the time limitation of Section 10 (b) is inapplicable. Finally, the addition by amendment of Crum's name to the charge alleging an identical discrimination against Purnell was proper under well-established principles.

ARGUMENT

I

The Board properly found that the execution and enforcement of the Coast and Dock Agreements constituted a violation by respondent WEW of Section 8 (a) (1), (2), and (3) of the Act, and by respondent unions of Section 8 (b) (1) (A) and (2) of the Act

The facts set forth in the Statement, *supra,* pp. 5–15, demonstrate the propriety of the Board's findings that WEW, by executing and by giving effect to the illegal hiring provisions of the Coast and Dock Agreement and by applying these illegal provisions to bar Crum and Purnell from employment, violated Section 8 (a) (1), (2), and (3) of the Act; and that ILWU and Local 19, by their conduct in these same respects violated Section 8 (b) (1) (A) and (2) of the Act. Inasmuch as several of the defenses proffered by respondents and treated separately hereunder relate only to the propriety of the Board's finding that the *execution* of the Coast and Dock Agreement constituted an unfair labor practice, it should be noted at the outset that even if respondents were to prevail in this regard, the enforceability of the Board's order would remain unaffected. For it is well settled that quite apart from their execution, the mere *enforcement* of illegal hiring restrictions in a contract furnishes adequate basis for a finding of unfair labor practice and for a remedial order such as is here prescribed. *Katz* v. *N. L. R. B.,* 196 F. 2d 411, 415 (C. A. 9). We turn now to a consideration of the specific violations found by the Board.

A. The violation of WEW of Section 8 (a) (1) and (3) of the Act

1. By the execution of the Agreements

Section 7 of the Coast Agreement provided specifically that union members were to be dispatched from the hiring hall in preference to nonmembers. The subsidiary Dock Agreement contained the same provision. The statutory preconditions for such hiring restrictions not having been fulfilled (*supra,* pp. 8–9), these provisions were illegal on their face. By their execution, the parties to the Agreement established the principle of discrimination in favor of union members which would in the future govern the hiring of employees. This action immediately jeopardized the right, guaranteed by Section 7 of the Act, of longshoremen and dock workers on the Seattle waterfront, who, under the Agreements, could be hired only through the hiring hall, to join any union, whether that union happened to be the ILWU or not, or to refrain from joining any union without danger of discriminatory treatment based on their union status. It established a basic relationship between job opportunity and membership in the ILWU, inevitably encouraging membership in the ILWU for those who were not already members, so that they might be eligible to take advantage of the preferential provisions of the agreements; and as inevitably discouraging such disqualification for the privilege of dispatch as would result from seeking membership in some rival union or from permitting membership in good standing in the ILWU and Local 19 to lapse even temporarily.

The execution of an agreement containing an illegal security provision has repeatedly been held by both the Board and by this and other courts to constitute an unfair labor practice. *N. L. R. B.* v. *National Motor Bearing Co.,* 105 F. 2d 652, 660 (C. A. 9); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 81 (C. A. 2); *N. L. R. B.* v. *Childs Co.,* 195 F. 2d 617, 618–619 (C. A. 2); *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524, 525, 528 (C. A. 7). As the court said in the *Red Star* case (at p. 81):

> The execution of a contract containing a forbidden union-security clause constitutes an unfair labor practice.[6] This is so because the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the union. It is no answer to say that the Act gives him a remedy in the event that he is discharged. The Act requires that the employees shall have freedom of choice, and any form of interference with that choice is forbidden.[7]

[6] *N. L. R. B.* v. *National Motor Bearing Co.*, 9 Cir., 105 F. 2d 652, 660; *Donnelly Garment Co.*, 50 N. L. R. B. 241, enforced *Donnelly Garment Co.* v. *N. L. R. B.*, 8 Cir., 165 F. 2d 940; *Amalgamated Meat Cutters and Butcher Workmen of North America (AFL)*, 81 N. L. R. B. 1052; *Unique Art Manufacturing Co.*, 83 N. L. R. B. 1250.

[7] The Board points out that the proviso clause of Section 8 (a) (3) which allows the "making" of a union-shop contract under certain prescribed conditions negatively implies that absent those conditions the "making" of such an agreement would be an unfair labor practice.

In the instant case the Board properly found that the execution of the agreements as such constituted a violation of Section 8 (a) (1) and (3) of the Act.

2 By the enforcement of the agreements

The ~~execution of the~~ executed Agreements containing the illegal hiring restrictions ~~was~~ were put immediately into practice. The finding of the Board that Crum and Purnell were denied dispatch from the hiring hall pursuant to the illegal union-security provisions of the Coast Agreement is supported by overwhelming evidence. The line of union action is clearly outlined. The Agreements provided that "union members" should be dispatched before nonunion men. It is undisputed that the union interpreted the term "union members" in the Agreements to mean union members in good standing, and that it had established the practice, under this interpretation of the Agreement, of denying dispatch, and thereby causing the employers bound to hire through the hiring hall, to deny employment both to nonunion men and to union members who were not in good standing and subject to punishment for breaches of union law. The practice was effectively carried out in the case of members not in good standing by the simple method of placing a "bug" behind their names on the board and of not dispatching them until the "bug" had been removed after they had regained their good standing. Union members were quite aware that they would not be dispatched as "union members" so long as their name was "bugged" on the board. They also knew that those not in the class of "union members" were

reached for dispatch only after all registered men had been dispatched (*supra,* p. 11). These facts are nowhere denied in the record.

The evidence in respect to Crum and Purnell attests the fact that they were treated strictly in accordance with the established practice. The constitution and bylaws of the union provided that members who did not pay fines assessed against them should be suspended at the end of 30 days. When Crum was erroneously told that he could not work at all after the fine was levied against him, and challenged the accuracy of this statement, the representative of the ILWU promptly confirmed him in the belief that he "had 30 days to work" and as promptly told the union secretary to instruct the dispatcher at the hiring hall not to "bug" the men who had been fined for 30 days (*supra,* p. 11). Purnell was told when the fine was imposed that he "had 30 days to work" (*supra,* p. 14). After the 30-day period had expired, a dispatcher told Crum that there was a "bug" behind his name on the board and he could not work any more until he paid his fine (*supra,* p. 14). Chief Dispatcher Laing refused Purnell a "statement of availability" which would make him eligible for unemployment compensation, but also told him that his "time was up" and that he could not work until his fine was paid. Purnell was also told by the secretary of the union that he could not work until his fine was paid (*supra,* pp. 14–15). It is apparent that dispatch was being denied to both Crum and Purnell in strict accordance with the established practice of using the preferential hiring provision of

the agreement to punish union members not in good standing by denying them dispatch and thus rendering their employment impossible.

Respondent WEW was aware of this union practice and made no move to change it (R. 526–527), although its members were bound by the agreement to hire all their longshoremen through the union hiring hall (*supra,* p. 6). In their hiring of longshoremen they acquiesced in the practice of the Union and enforced the union-security provision of the agreement by giving preference in employment to "members of the union." Such discrimination in the hire of employees, including Crum and Purnell, on the basis of union status or membership, necessarily restrained employees in violation of Section 8 (a) (1) in the exercise of their right to refrain from becoming or remaining members of a union as a condition of employment and encouraged membership in the Union in violation of Section 8 (a) (3). (*Katz* v. *N. L. R. B.,* 196 F. 2d 411, 415 (C. A. 9); *N. L. R. B.* v. *Pinkerton National Detective Agency,* 202 F. 2d 230 (C. A. 9); *N. L. R. B.* v. *Jarka Corp.,* 198 F. 2d 618, 620 (C. A. 3); *N. L. R. B.* v. *Peerless Quarries,* 193 F. 2d 419 (C. A. 10), enforcing 92 N. L. R. B. 1194, 1195).[21]

[21] The Trial Examiner failed to find that Purnell had been refused dispatch and accordingly recommended dismissal of the complaint insofar as it alleged discrimination against Purnell by WEW or Local 19. The Trial Examiner relied for this recommendation upon the uncorroborated statement of Chief Dispatcher Laing that Purnell's name "had not been removed from the board" and that he would have been eligible for dispatch if he had applied. This statement, however, is at variance with abundant and uncontroverted evidence of settled union practice in respect to union members not in good standing and is at variance also with Laing's statement to Purnell that Purnell could not work any

B. The violation of Section 8 (a) (2)

The execution and enforcement of the illegal hiring restrictions also, as the Board found, furnished very substantial support to the Union. The Union was thereby placed in a position of prestige and power which enabled it to further the employment of its members to the disadvantage of nonunion men, thereby placing a premium upon union membership. It has been repeatedly held that such support constitutes a violation of Section 8 (a) (2) of the Act.[22] *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 414–415 (C. A. 9), enforcing 91 N. L. R. B. 647, 648. Accord: *N. L. R. B.* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 695; *Peerless Quarries, supra; Julius Resnick, Inc.*, 86 N. L. R. B. 38, 40; *Salant & Salant, Inc.*, 87 N. L. R. B. 215, 218; *Meat Cutter's Local 421 (Von's Grocery Co.)* 91 N. L. R. B. 504, 517; *Vaughn Bowen*, 93 N. L. R. B. 1147, 1183; *Federal Stores*, 91

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more until he paid his fine (*supra*, pp. 14–15). Under these circumstances the Board was fully warranted in rejecting the Trial Examiner's recommendation in this respect which was made upon a finding as to which he himself admittedly had "large doubts" (*supra*. p. 17).

Nor can respondents draw any comfort from the fact that Purnell did not "plug in" after the fine was assessed against him. Purnell's failure to "plug in" at the outset was because he was physically incapacitated; and, after the 30-day period of grace had expired, because he knew that it was useless. Purnell was not required to perform a futile act. *J. R. Cantrall Co.*, 96 N. L. R. B. 786, 787, enforced 201 F. 2d 853 (C. A. 9); *Daniel Hamm Drayage Co., Inc.*, 84 N. L. R. B. 458, 459, enforced 185 F. 2d 1020 (C. A. 5).

[22] Section 8 (a) (2) provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it * * *."

N. L. R. B. 647, 648; *Strauss Stores Corp.,* 94 N. L. R. B. 440, 441; *Hager and Sons Hinge Mfg. Co.,* 80 N. L. R. B. 163.[23]

C. The violation by respondent unions of Section 8 (b) (1) (A) and (2)

Section 8 (b) (1) (A) of the Act provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *.

Section 8 (b) (2) of the Act provides that:

> (b) It shall be an unfair labor practice for a labor organization or its agents—(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees

[23] The Trial Examiner refused to find that the execution and enforcement of the agreements violated Section 8 (a) (2) of the Act on the ground that the WEW did not "dominate or interfere" with respondent unions or furnish financial support, and that the execution and enforcement of the agreements cannot be included under the statutory term "other support." Section 8 (a) (2), however, is not limited by its terms or in its interpretation by the Board or the courts to apply only to unions which are dominated or interfered with by the employer. Nor is there warrant either in the statute or in court or Board decision for excluding the type of support here involved from the proscription of the statute.

uniformly required as a condition of acquiring or retaining membership.

It is well established that a union, by executing an agreement with an employer containing an illegal security provision, and by enforcing the agreement through some arrangement which gives it control over the selection of employees so as to discriminate against nonunion applicants for employment, restrains and coerces the employees in the right guaranteed in Section 7 to join any union or no union, in violation of Section 8 (b) (1) (A) of the Act, and causes the employer to discriminate against the employees within the meaning of Section 8 (a) (3), thus violating Section 8 (b) (2) of the Act. *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union of New York and Vicinity,* 192 F. 2d 654, 656 (C. A. 2); *N. L. R. B.* v. *Fry Roofing Co.,* 193 F. 2d 324 (C. A. 9) enforcing 89 N. L. R. B. 854; see also *N. L. R. B.* v. *Sterling Furniture Co.,* 202 F. 2d 41 (C. A. 9) remanded to Board on other grounds; *Union Starch and Refining Co.* v. *N. L. R. B.* 186 F. 2d 1008 (C. A. 7), certiorari denied, 342 U. S. 815; *Acme Mattress* case cited *supra; N. L. R. B.* v. *Childs Company,* 195 F. 2d 617, 618–619 (C. A. 2); *Red Star Express Lines* v. *N. L. R. B.* 196 F. 2d 78 80–81 (C. A. 2); *N. L. R. B.* v. *International Union, United Automobile etc. Workers et al.,* 194 F. 2d 698, 702 (C. A. 7).

In the instant case the ILWU was a party to the Coast Agreement, which established, in a preferential

hiring provision, the requirement that the employer discriminate in favor of members of the ILWU in hiring longshoremen. Local 19 was a party to the Dock Agreement which contained the same preferential provision. These requirements were effectuated in the case of both agreements through the hiring hall, operated by Local 19 (which administered the Coast Agreement in behalf of the ILWU and the Dock Agreement in its own behalf), where, through the Chief Dispatcher, union members were dispatched to employers in preference to nonmembers. The ILWU and Local 19, both by executing agreements containing illegal hiring provisions and by giving preference in employment to union members pursuant to the agreements, patently restrained and coerced employees in their rights to join or refrain from joining a union in violation of Section 8 (b) (1) (A) of the Act, and, through the discriminatory manner of operating the hiring hall, pursuant to the agreement caused the employer to discriminate in the hire of longshoremen in violation of Section 8 (a) (3), thus violating Section 8 (b) (2) of the Act. See authorities cited, *supra,* p. 32.

D. The defenses interposed by respondents are without merit

1. In respect to the execution of the agreements

a. *The Coast Agreement*

Respondent WEW contended that the Board was precluded from making any finding in respect to the execution of the Coast Agreement on the ground that the charge alleging such execution to be an unfair labor practice was not issued within six months of the

execution date and was therefore prohibited by the six month statute of limitation on the issuance of complaints contained in Section 10 (b) of the Act.[24] WEW argues in support of this contention that the contract was executed on November 25, 1948, more than six months before the filing of the charge on June 14, 1949. The record shows that an oral agreement was reached by the parties in respect to at least some of the provisions of the Agreement on or about November 25, 1948, while a strike was in progress. These provisions were put into effect on December 6, 1948, at the end of the strike. However, on December 17, 1948, the parties for the first time drew up and initialed a written agreement incorporating the illegal hiring provisions here in issue.[25]

If the oral agreement of November 25, 1948, comprehended the unlawful provisions later embodied in the agreement of December 17, 1948, an unfair labor practice was committed at that time. However, whatever was the actual situation on November 25, 1948,

[24] Section 10 (b) of the Act provides:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purpose, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

[25] This agreement was not the final form of the Coast Agreement. The December 17 agreement contained a prefatory note which recited that the final form of the agreement had not been and would not be signed until matters still under negotiation had been agreed upon (*supra*, p. 34).

an unfair labor practice certainly arose, as the Board found, on December 17, 1948, when the parties explicitly entered into and initialed a written agreement containing such illegal provisions,[26] and since this date was within six months of the June 14, 1949, charge, the preclusion of Section 10 (b) is plainly inoperative.

b. *The Dock Agreement*

Respondents contend that the Board is precluded from making any finding in respect to the execution of the Dock Agreement on the ground that the Dock Agreement was not executed until after the original charge was filed and its execution antedated by more than six months the amended charge which for the first time alleged the execution and enforcement of the Dock Agreement, and for the first time named Local 19 in connection therewith. In respondents' view the Board is thereby introducing a new and

[26] Through inadvertent error in its original Decision and Order, the Board found that the final form of the Coast Agreement was executed in February 1949 and predicated its finding of unfair labor practice on that document (R. 134). Upon discovery of this error, the Board issued to the parties a Notice To Show Cause within twenty days why a Supplemental Decision and Order attached to the Notice should not issue. No response having been made by any of the parties within the time allowed, the Board issued the Supplemental Decision and Order in which it found, like the Trial Examiner, that the execution and initialing of the December 17 memorandum of agreement removed any procedural bar to a finding "that WEW had committed an unfair labor practice by its execution and effectuation of the unlawful preference clauses of the Coast Agreement." The Supplemental Decision and Order, inadvertently omitted from the printed record, are reproduced in an appendix to this brief, pp. 45–48.

separate proceeding and a new party, Local 19, contrary to the prohibition of Section 10 (b) of the Act.

The fallacy of this contention rests in respondents' complete misapprehension of the issue presented. The gravamen of the initial charge was the execution and enforcement of an illegal preferential hiring provision in the Coast Agreement. Notwithstanding the notice afforded by the initial charge that the execution and enforcement of such illegal provisions were regarded as unfair labor practices, WEW, which had authorized and ratified the Coast Agreement, and Local 19, the Seattle affiliate of ILWU, the other party to the Coast Agreement, executed and enforced the Dock agreement which applied specifically to dock workers in the Seattle area and repeated literally the illegal provisions of the Coast Agreement.

It is obvious, therefore, that the unfair labor practice involved in the execution and enforcement of the illegal provisions of the Dock Agreement was only a continuation of the identical unfair labor practice alleged in the initial charge. By the same token, Local 19 of ILWU, which had jurisdiction over the Seattle area, and executed and enforced both the Coast Agreement and the subsidiary Dock Agreement in behalf of its parent organization, ILWU, was not a new party, but merely an agent of ILWU which was initially named.[27] It follows that in no sense did the

[27] In this frame of reference, respondents can have no tenable basis for objecting to the inclusion of Local 19 as a party to the proceeding. Indeed, as already demonstrated, p. 34, the Board could properly have included Local 19 as a party and issued the

amended charge introduce a new and unrelated proceeding and a new and unrelated party; it merely brought up to date the basic allegations propounded in the initial charge. And it has long been established that a charge may be amended to include further instances or extensions of the unfair labor practices originally alleged. *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 368–369; *Katz* v. *N. L. R. B.,* 196 F. 2d 411, 415 (C. A. 9); *N. L. R. B.* v. *Top Mode Mfg. Co.,* 31 L. R. R. M. 2619, 2620 (C. A. 3), decided April 15, 1953; *Superior Engraving Co.* v. *N. L. R. B.,* 183 F. 2d 783, 790 (C. A. 7), certiorari denied, 340 U. S. 930; *Cathey Lumber Co.,* 86 N. L. R. B. 157, 158–163, enforced *per curiam,* 185 F. 2d 1021 (C. A. 5), subsequently set aside on grounds not here pertinent; *N. L. R. B.* v. *Westex Boot and Shoe Co.,* 190 F. 2d 12, 13–14 (C. A. 5); *Olin Industries, Inc.* v. *N. L. R. B.,* 191 F. 2d 613, 616 (C. A. 5), certiorari denied, 343 U. S. 919; *Cusano* v. *N. L. R. B.,* 190 F. 2d 898, 903–904 (C. A. 3); *N. L. R. B.* v. *Kobritz,* 193 F. 2d 8, 15–16 (C. A. 1).

2. In respect to the enforcement of the agreements

Respondent WEW sought to escape responsibility for the discrimination practiced against Crum and Purnell on the ground that it is not an "employer" and hence may not be found guilty of a violation of Section 8 (a) (3) of the Act. There is no merit in

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order here sought to be enforced without regard to Local 19's participation in the execution of the Dock Agreement. The mere fact that Local 19, an ILWU affiliate, enforced the illegal hiring provisions of the Coast and Dock Agreements is adequate basis for the Board's finding and order with respect to Local 19.

this contention. Section 2 (2) of the Act provides that "the term 'employer' includes any person acting as an agent of an employer, directly or indirectly." Respondent WEW served as the agent of its employer members and acted in their interest in the ratification of the Coast agreement and in the execution of the Dock agreement (*supra,* pp. 5, n. 6, 7). The Board properly held it to be an employer within the meaning of the Act.

Respondent WEW and ILWU both seek to escape responsibility for the enforcement of the Agreements on the ground that they have no present part in the management of the Seattle hiring hall, which is operated by the Port Labor Relations Committee, and that they had no knowledge of the discrimination alleged in respect to Crum and Purnell. WEW asserts that the Employers are represented on the Committee by PMA; the ILWU asserts that the union is represented on the Committee, and the hiring hall managed from day to day, by Local 19. These grounds, however, are wholly insufficient to relieve either the WEW or the ILWU from their responsibility as parties to the Agreement for the manner in which the Agreement is enforced. The Agreement specifically provided that the Port Labor Relations Committee in each of a number of named ports should be composed of "three representatives designated by the Employers (i. e., the WEW and other employer associations named in the preamble to the Agreement (R. 63; 229)) and three representatives designated by "the Union" (i. e., the ILWU (R. 63; 229, 260)),

and that this committee should maintain and operate the port hiring hall, have control of the registration lists, decide questions of rotation of gangs and extra men (R. 64; 248, 260), and set standards for the Chief Dispatcher (R. 247). To the extent that PMA and Local 19 were serving on the Committee at the time of the unfair labor practices here involved, they were doing so as the representatives and agents of the Employers (including WEW), and the ILWU, respectively. Under principles of agency so well established as not to need the support of extensive authority, the Employer, including the WEW and the ILWU remained responsible for the decisions and actions of the Committee, if reasonably within the scope of the Committee's authority or reasonably to be anticipated from the terms of the Agreement. (Restatement of the Law of Agency, § 43).[28]

In the instant case the discrimination against Crum and Purnell was carried out pursuant to the preferential hiring provision of the Agreement and was a reasonably to be anticipated result of the provision. Moreover, the fact that discrimination was regularly

[28] § 42 of the Restatement states:

"ACQUIESCENCE BY PRINCIPAL

"(1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization acquiescence in it indicates affirmance.

"(2) Acquiescence by the principal in a series of acts by the agent indicates authorization to perform similar acts in the future.

practiced at the hiring hall against nonunion men in the matter of dispatch was known to the WEW through its president, Daryl Cornell, who was serving on the Committee as a representative of PMA and who admitted that he had "heard rumors" of the practice (*supra,* p. 29). That it was known also to the ILWU is evidenced by the fact that Gettings, the Seattle representative of ILWU, told Crum that he had thirty days to work after he was fined, and instructed the secretary of Local 19 not to "bug" the men fined for thirty days (*supra,* p. 11).

Finally, Local 19 sought to evade liability for the discrimination against Crum because Crum failed to file charges against Local 19 within six months of January 29, 1949, the date of the discrimination against him.[29] Disagreeing with the Trial Examiner in this respect, the Board rejected the contention of Local 19 and found that the charges which were timely filed by Purnell alleging that Local 19 caused WEW to deny him employment were sufficient to support the addition of the name of Crum by amendment thereafter. The discrimination against Crum was identical in nature to that practiced against Purnell, and the propriety of such an amendment is well-settled. See cases cited, *supra,* p. 38.

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[29] Crum's original charge, filed on June 14, 1949, alleged merely that ILWU had, in accordance with the illegal provisions of the Coast Agreement, caused WEW to discriminate against him. On December 1, 1950, Crum amended his charge to allege that *ILWU and Local 19* had caused the unlawful discrimination against both Crum and Purnell.

II

THE BOARD'S ORDER IS VALID AND PROPER

The Board's order requires respondents WEW, ILWU, and Local 19 to cease and desist from giving effect to the union-security provisions of such of the agreements herein involved as they are party to; and from entering into or renewing, agreeing or participating in the enforcement of like or related union-security provisions which impose the requirements of union membership as a condition of employment upon employees or prospective employees of employers utilizing the Seattle hiring hall, unless the provisions conform to the requirements of Section 8 (a) (3) of the Act. The order further requires respondents jointly and severally to make whole Clarence Purnell and Albert Crum for the discrimination practiced against them.[30] Such requirements are the Board's usual, proper, and necessary remedy to effectuate the purposes of the Act by restoring the *status quo* upon

[30] The Board, in view of its finding that the "deregistration" of Crum had not been effected in good faith (*supra*, p. 20), specified that Crum should be restored to all the dispatch privileges of the hiring hall without regard to his union membership status and to the "deregistration" (R. 150–157).

The Board also directed that, in accordance with its usual policy under circumstances such as those here presented, the back pay computation with respect to Crum and Purnell should exclude the period between the date of the Intermediate Report of the Trial Examiner and the date of its own Decision and Order, and, with respect to Purnell, should exclude also the period when Purnell was physically unable to work (R. 156). Finally, the Board provided that WEW could terminate its back pay liability within five days after giving appropriate notices of its willingness to cease authorizing the discriminatory hiring policies found to be unlawful (R. 156–157).

a finding of the responsibility of respondents for the execution of the illegal provisions of the union-security agreements and for the enforcement of these provisions to the detriment of prospective employees. *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, 1013 (C. A. 7), certiorari denied, 342 U. S. 815; *N. L. R. B.* v. *Jarka Corp.,* 198 F. 2d 618 (C. A. 3); *Red Star Express Lines* v. *N. L. R. B.,* 196 F. 2d 78, 81 (C. A. 2); *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524, 526 (C. A. 7); see *N. L. R. B.* v. *Sterling Furniture Co.* (C. A. 9), No. 13196 This Term, order approved in principle but remanded to Board for the addition of a necessary party.

The Board's order further requires respondent WEW to notify the Port Labor Relations Committee and the dispatchers at the hiring hall that they are not to give effect to the illegal provisions of the Coast and Dock Agreements, that they are not to discriminate against employees through the hiring hall on the basis of union membership, and that they are to restore the privileges of dispatch to Crum and Purnell; notify its employer members of the Board's order and invoke such rights and powers as it may have to insure the cooperation of its members in carrying out the terms of the order. Such requirements are proper and necessary in view of the position of WEW as a party to the agreements in its capacity as agent of its members. Since the responsibility of WEW encompasses not only the execution but the enforcement of the agreements through the agency of the Port Labor Relations Committee and the dispatchers, the order properly includes a requirement that the Com-

mittee be notified of the necessity of complying with the order. The requirement that the WEW request its employer members to cooperate in complying with the Board's order is a proper and wise exercise of the Board's discretion and is "adapted to the situation which calls for redress." *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 348.

CONCLUSION

It is respectfully submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

MAY 1953.

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 19–CB–38 and 19–CB–62

IN THE MATTER OF INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION AND LOCAL 19, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION *and* CLARENCE PURNELL (AN INDIVIDUAL) *and* ALBERT G. CRUM (AN INDIVIDUAL)

Cases Nos. 19–CA–220 and 19–CA–229

IN THE MATTER OF WATERFRONT EMPLOYERS OF WASHINGTON, AND ITS EMPLOYER MEMBERS *and* ALBERT G. CRUM (AN INDIVIDUAL) *and* CLARENCE PURNELL (AN INDIVIDUAL)

Case No. 19–CA–227

IN THE MATTER OF LUCKENBACH STEAMSHIP COMPANY, INC., *and* CLARENCE PURNELL (AN INDIVIDUAL)

Case No. 19–CA–228

IN THE MATTER OF ALASKA STEAMSHIP COMPANY *and* CLARENCE PURNELL (AN INDIVIDUAL)

Case No. 19–CA–230

IN THE MATTER OF ROTHSCHILD-INTERNATIONAL STEVEDORING COMPANY *and* CLARENCE PURNELL (AN INDIVIDUAL)

Case No. 19–CA–256

IN THE MATTER OF ALASKA TERMINAL AND STEVEDORING CO. *and* CLARENCE PURNELL (AN INDIVIDUAL)

Case No, 19–CA–257

IN THE MATTER OF TAIT STEVEDORING CO., INC. *and* CLARENCE PURNELL (AN INDIVIDUAL)

Supplemental Decision and Order Amending and Clarifying Certain Findings in the Decision and Order of February 26, 1952

On February 26, 1952, the Board issued its Decision and Order in the above-entitled case.[1] Upon further consideration, it appeared to the Board that certain findings in such Decision and Order should be amended and clarified. Accordingly, on November 4, 1952, the Board issued a Notice to Show Cause,[2] returnable on or before November 24, 1952, why the proposed Supplemental Decision and Order Amending and Clarifying Certain Findings in the Decision and Order of February 26, 1952, attached to said Notice, should not issue. None of the parties has responded to said Notice.

It is hereby ordered that the Decision and Order in the above-entitled case, which issued February 26, 1952, be and the same is hereby amended by deleting the fourth paragraph under Section A of the said Decision and Order, and substituting therefor the following:

> More specifically, as to the Coast agreement, the Respondent WEW urges that its unfair labor practice, if any, of "executing" the un-

[1] 98 N. L. R. B. No. 44.

[2] 101 N. L. R. B. No. 53.

lawful preferential hiring contract was committed on or about November 25, 1948, when the parties thereto orally affirmed it, or, at the latest, on December 6, 1948, when it became effective, and that hence the charge filed by Crum on June 14, 1949, was clearly "untimely." The Trial Examiner rejected this contention upon findings, *inter alia,* that "execution" of the provisions of the Coast agreement here under attack took place on December 17, 1948. For, on that date (which preceded the filing and service of the June 14, 1949, Crum charges by less than 6 months) a written memorandum of so much of the agreement as included the provisions in question was initialled for and on behalf of the parties, of which Respondent WEW was one.

We agree with the Trial Examiner's conclusion that Crum's June 14, 1949, charges permit consideration of so much of the complaint as is predicated upon Respondent WEW's execution or making of the portions of the Coast agreement. For we are satisfied that the initialling of the written memorandum of the agreement on December 17, 1948, was a formal act of execution which give rise to a cause of action based upon the making or execution of the provisions of the contract alleged to be unlawful.[3] We hold, therefore, as did the Trial Examiner, that there is no procedural bar to our finding that WEW committed an unfair practice by its execution and effectuation of the

[3] This is so irrespective of whether any earlier or later act of further affirmation or ratification of the contract by or on behalf of WEW may also have given rise to a cause of action against it for its participation in the making or execution of this contract.

unlawful preference clauses of the Coast Agreement.[4]

Signed at Washington, D. C.

PAUL M. HERZOG,
Chairman
JOHN M. HOUSTON,
Member
PAUL L. STYLES,
Member
[SEAL] *National Labor Relations Board.*

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[4] We note that, in any event, the continued existence of the unlawful preferential hiring contract and its enforcement at all times here material is in itself sufficient to support an order prohibiting WEW from giving the unlawful portions of the contract any further effect, and from renewing, extending or entering into, any like or related agreement. See e. g. *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719 (C. A. 2); *Leo Katz, dba Lee's Department Store* v. *N. L. R. B.*, 196 F. 2d 411 (C. A. 9); Federal Stores, Inc., 91 N. L. R. B. 647, 657.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (includ-

ing the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1953